

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**CTC COMMUNICATIONS CORP.'S
FORMAL COMPLAINT CONCERNING
UNLAWFUL REFUSAL
BY VERIZON MASSACHUSETTS
TO PROVIDE UNBUNDLED NETWORK
ELEMENTS AT TARIFFED RATES**

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DTE No. 04-87

**CTC'S OPPOSITION TO VERIZON'S
MOTION FOR RECONSIDERATION
AND MOTION FOR RELIEF**

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CTC Communications Corp. ("CTC") hereby submits its Opposition to Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon") Motion for Reconsideration and Motion for Relief from Tariffing Requirement. The DTE's Order on Motion for Reconsideration ("Reconsideration Order") did not result from mistake or inadvertence nor from lack of notice or of a reasonable opportunity to prepare and present evidence and argument. The DTE made a determination based on an extensive record, including multiple submissions by Verizon, that adequately set forth the factual and legal basis for the Reconsideration Order. Moreover, Verizon plainly was on notice, given the DTE's tariff requirements and CTC's Complaint, that the DTE could find Verizon's UNE-P replacement services were being offered on a common carriage basis, and that it could require Verizon to tariff its UNE-P replacement services and rates. The DTE is not required to hold an evidentiary hearing in every adjudicatory proceeding, and neither party in this proceeding requested one. Verizon had ample opportunities to present arguments and evidence material to the disposition of this proceeding in its answer and its response to CTC's Motion for Reconsideration. Indeed, Verizon has not offered in its

Motion for Reconsideration any new facts that would significantly impact the DTE's Reconsideration Order, and merely repeats its prior arguments. Accordingly, the DTE should deny the motion and affirm its Reconsideration Order.

Verizon's Motion for Relief should also be denied because the Department requires carriers to file tariffs for all intrastate services offered on a common carrier basis, regardless of the number of entities that actually receive the services, and cannot waive the tariffing requirement.

ARGUMENT

I. MOTION FOR RECONSIDERATION

A. Verizon's Procedural Rights Have Not Been Denied

Verizon erroneously argues that the DTE denied its procedural rights by issuing the Reconsideration Order. In the Reconsideration Order, the DTE found that CTC's Complaint sought relief from Verizon's imposition of non-tariffed rates for the UNE-P replacement services and directed Verizon to file tariffs for those services.¹ The Reconsideration Order did not result from mistake or inadvertence nor from lack of notice or a reasonable opportunity to prepare and present evidence and argument.

1. Verizon Had Adequate Notice and Opportunity to Present Evidence and Argument

As the DTE has recognized, "[t]he fundamental elements of due process are *notice* and an *opportunity to be heard*."² The Supreme Judicial Court of Massachusetts has

¹ Reconsideration Order at 9, 19. *See also* CTC Complaint at 1 and ¶ 24 and CTC Motion for Reconsideration at ¶¶ 16-17.

² *Petition of Western Massachusetts Electric Company for Approval of Changes to its Rate Tariffs Effective January 1, 2001*, D.T.E. 00-110-C, 2001 Mass. PUC LEXIS 20, at *16-17 (Apr. (Cont'd))

further stated “[t]he fundamental right protected by due process is the right to be heard in a meaningful manner at a meaningful point in the process”³ and that notice is sufficient when “persons whose rights may be affected [] understand the substance and nature of the grounds upon which they are called to answer.”⁴ In addition, the DTE has found “actual notice,” such as when a party receives a copy of a pleading making a specific request, to be sufficient.⁵ As explained more fully below, Verizon had actual notice of the issues in this proceeding and had an opportunity to be heard at meaningful points in the proceeding.

First, Verizon was on notice that the DTE could find Verizon’s UNE-P replacement services were being offered on a common carriage basis, and therefore, it could require tariffing of those services and rates. CTC’s Complaint stated that there is a “requirement to tariff all rates for intrastate services offered on a common carrier basis in Massachusetts,” and that “Verizon may not lawfully impose any UNE-P surcharges unless and until it has filed such surcharges with the Department.”⁶ CTC further argued in its Motion for Reconsideration that Verizon offered the replacement service on a

13, 2001) (emphasis supplied) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

³ *Massand v. Med. Prof. Mut. Ins. Co.*, 651 N.E.2d 403, 406 (Mass. 1995) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)).

⁴ *Id.* (citing *Langlitz v. Board of Registration of Chiropractors*, 486 N.E.2d 48 (1985), quoting *Higgins v. License Comm’rs of Quincy*, 308 Mass. 142, 145, 146, 31 N.E.2d 526 (1941)).

⁵ *Id.* at * 17.

⁶ CTC Complaint at ¶¶ 23-24.

common carrier basis, and as a result, must tariff the offering.⁷ Accordingly, Verizon received proper, actual notice of the issues in this proceeding.⁸

Second, Verizon had ample opportunity to—and did—present arguments and evidence at meaningful points in the proceeding. In its Answer and Opposition to the CTC Motion for Reconsideration, Verizon argued that it was not required to tariff its surcharges and acknowledged CTC’s arguments that the state law precludes Verizon from charging the replacement service rates until they are approved by the DTE.⁹

Verizon also implies that it was denied due process because the DTE did not hold an evidentiary hearing with direct and cross examination of witnesses.¹⁰ The DTE, however, is not required to hold an evidentiary hearing pursuant to 220 CMR § 1.06. Indeed, “compliance with [G.L. c. 30A, §§ 10 and 11] does not always dictate that the Department conduct a full evidentiary hearing.”¹¹ Hearings are only required upon direction of an agency or upon request by a party.¹² In other proceedings, the DTE has issued orders based only on briefs and arguments.¹³ Here, the DTE made its determina-

⁷ CTC Motion for Reconsideration at ¶¶ 21-24.

⁸ Verizon Motion for Reconsideration at 4.

⁹ Verizon Answer at 8-9; Verizon Opposition to CTC Motion for Reconsideration at 10-13.

¹⁰ Verizon Motion for Reconsideration at 4.

¹¹ *In Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A, 1998 WL 808053, * 5 (July 24, 1998).

¹² G.L. c. 30A, § 10; 220 CMR § 1.06.

¹³ *MCI Worldcom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts*, D.T.E. 97-116-G, * 11 (December 20, 2002) (Verizon recognized that the Department issued its order solely on the brief and arguments).

tion based on a complete record, which provided ample basis for its decision, although neither party in this proceeding requested an evidentiary hearing.

Further, *In Re: Petition of CTC Communications Corp.* is inapposite to this proceeding. In that case, the DTE held that Verizon relied on statements by the hearing officer that a scoping order would be issued prior to a decision on the merits, which could have limited the depth or breadth of its responses.¹⁴ In addition, the DTE determined that Verizon's reliance may also have prevented it from requesting an evidentiary hearing before rendering of the final order.¹⁵ No such statement was made in this proceeding, and therefore, Verizon has no basis for claiming that it was denied notice or a reasonable opportunity to prepare and present evidence and argument or request a hearing.

2. Verizon Presents No New Facts That Would Significantly Impact the Reconsideration Order

The DTE's policy on reconsideration is well established; such relief is "granted only when extraordinary circumstances dictate that [the DTE] take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation."¹⁶ In addition, a motion for reconsideration should "bring to light previously unknown or undisclosed facts that would have a *significant* impact upon the

¹⁴ *In Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A, 1998 WL 808053, * 5 (July 24, 1998).

¹⁵ *Id.*

¹⁶ Reconsideration Order at 7 (citing *North Attleboro Gas Company*, D.P.U. 94-130-B at 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 558-A at 2 (1987)).

decision already rendered.¹⁷ A motion for reconsideration should not attempt to reargue issues considered and decided in the main case.¹⁸

Verizon has not offered in its Motion for Reconsideration any new facts that would *significantly* impact the DTE's Reconsideration Order. Verizon's "new" facts are that it entered into an individually negotiated commercial agreement with CTC and that currently only four CLECs receive Verizon's UNE-P replacement services and are assessed the surcharge. If CTC and Verizon entered into an individually negotiated agreement addressing the terms on which Verizon "would provide post-UNE platform services to CTC" as Verizon asserts, then it occurred "*subsequent to their filing motion papers in this case.*"¹⁹ However, any new agreement would only limit the amount in dispute to those untariffed surcharges Verizon unlawfully sought to impose on CTC up to the effective date of such new agreement.²⁰ Moreover, the current provision of the replacement services at purported resale equivalent rates to only four CLECs does not change the fact that Verizon offered the service indiscriminately on uniform terms to all CLECs in Massachusetts.²¹ Verizon has merely used its Motion for Reconsideration to repeat its prior argument that it has not offered the replacement services on a common

¹⁷ *Id.* (emphasis supplied).

¹⁸ *Id.* (citing *Commonwealth Electric Company*, D.P.U. 92-3C-1A at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 3 (1991); *Boston Edison Company*, D.P.U. 1350-A at 4 (1983)).

¹⁹ Verizon Motion for Reconsideration at 6 (emphasis added).

²⁰ The UNE-P rates that were in effect under Verizon's tariffs on the date CTC filed its Complaint were in effect at least until the DTE withdrew its suspension of Verizon's changes to its UNE tariffs on January 23, 2005. CTC paid the TELRIC UNE-P rates for the services Verizon chose not to terminate from August 22, 2004, the date Verizon first sought to impose its unlawful surcharges and during the period affected by this dispute.

²¹ See CTC Brief, filed concurrently herewith, at 17-19.

carriage basis. These “new” facts and repeated arguments do not render this proceeding moot and would not cause a significantly different outcome from the DTE’s Reconsideration Order.

B. The DTE Correctly Held That Verizon’s Proposed Surcharges and Replacement Services Are Not Governed By the Parties’ Interconnection Agreement

As CTC more completely describes in its Brief in Support of the Department’s Decision (“CTC Brief”) filed concurrently with this pleading, the DTE properly found that section 1.5 of the Parties’ Interconnection Agreement does not obligate Verizon to offer a replacement service nor does it create an obligation for CTC to purchase UNE replacement services from Verizon.²² Section 1.5 contemplates that Verizon will first terminate its UNE-P services to CTC and then CTC may elect to purchase other services. However, Verizon never terminated the UNE-P services it provided to CTC, and CTC never “elected” to purchase replacement services offered by Verizon. Indeed, CTC repeatedly and expressly rejected Verizon’s surcharges and services, and Verizon does not and cannot explain how the services were “elected,” given that CTC never consented to Verizon’s replacement service offer.²³

Moreover, the Parties’ Interconnection Agreement does not address the “applicable charges” for replacement services.²⁴ In fact, Verizon has steadfastly maintained that it does not include Section 271 terms and any non-Section 251 terms in its interconnection

²² CTC Brief at 7-12.

²³ CTC Brief at 12-16.

²⁴ CTC Brief at 9-10.

agreements.²⁵ Therefore, the interconnection agreement may have permitted Verizon to discontinue UNE-P services, but it does not enable Verizon to unilaterally impose rates for services that Verizon has expressly stated are not provided under the interconnection agreement or its tariffs.

Consequently, the DTE correctly determined that the Parties' Interconnection Agreement did not govern the replacement services and applicable rates, terms and conditions and that a carrier may purchase services from a tariff when its interconnection agreement does not govern access to the services sought to be purchased.²⁶ Because the Department's decision was correct on the merits, it should be upheld even if Verizon's Motion for Reconsideration were not procedurally flawed as detailed in the preceding sections.

II. MOTION FOR RELIEF

Verizon requested that the Department grant it relief from the directive in the Reconsideration Order for Verizon to file tariffs for its "default arrangement for enterprise and four-lines-or-more UNE-P replacement services"²⁷ because only four CLECs – a *de minimus* number – currently use the replacement services at what Verizon characterizes as resale equivalent rates.²⁸ However, Verizon's request erroneously ignores the fact that it *offered* the service on a common carriage basis without filing a tariff with the Depart-

²⁵ CTC Brief at 11.

²⁶ Reconsideration Order at 9.

²⁷ Motion for Relief at 1.

²⁸ CTC is not one of those four remaining customers.

ment.²⁹ Moreover, the Department does not have discretion to waive the requirement to file tariffs for common carrier services.³⁰ For these reasons, the Department must reject Verizon's request.

CONCLUSION

WHEREFORE, CTC requests that the Department affirm its Reconsideration Order and deny Verizon's Motion for Reconsideration and Motion for Relief.

Respectfully submitted,



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²⁹ CTC Brief at 17-20. *See also* Mass. Gen. Laws Chapter 159, § 19 and Memorandum, Michael Isenberg, Director Telecommunications Division, Clarification of Wholesale Tariffing Requirements, Mass. DTE, at 1 (Aug. 12, 2003) ("Wholesale Tariff Memorandum").

³⁰ *Id.* *See also*, Wholesale Tariff Memorandum at 8.